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No. 90-1902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EASTERN AIR LINES, INC.,
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the district court and the court of appeals correctly held that the Railway Labor Act prohibits a carrier from refusing to reinstate former striking pilots to available pilot vacancies by designating new hire pilot trainees as permanent replacement employees even though the trainees had not performed any pilot services, occupied any pilot position, or replaced any striking pilot when the strikers unconditionally offered to return to work.

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RESPONDENTS' BRIEF IN OPPOSITION

This case concerns a narrow issue under federal collective bargaining law specific to both the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, and the circumstances involved in the hiring and training of pilots in connection with airline strikes.

In 1989, hundreds of pilots represented by the Air Line Pilots Association, International ("ALPA") unconditionally offered to return to work at Eastern Air Lines, Inc. ("Eastern") following a lawful pilot sympathy strike. At the time the former strikers sought reinstate-

ment, Eastern maintained hundreds of unfilled pilot positions and urgently needed hundreds of additional qualified pilots to operate its scheduled passenger flights. Eastern nonetheless refused to reinstate returning strikers and, instead, "reserved" its existing and future pilot vacancies for a pool of new hire pilot trainees who had not occupied any Eastern pilot position during the strike, who had not replaced any striking pilot in Eastern's flight operations, and who did not perform any Eastern pilot services until they completed pilot training months after strikers unconditionally offered to return to work.

The United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit declined to expand the permanent replacement doctrine rooted in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), in order to sanction Eastern's wholesale refusal to reinstate former strikers to post-strike pilot vacancies. Following an indistinguishable decision of the Eighth Circuit, the court of appeals held that the Railway Labor Act does not permit an employer to permanently replace its entire striking work force at the onset of a strike by amassing a pool of trainees who do not and cannot replace strikers or perform work for the employer until months after the strike has ended. The Petition, in turn, explicitly invites the Court to review this case in order to overturn a uniform interpretation of the Railway Labor Act among the circuits, Pet. 13-14, and to substantially expand the economic weapons available to an employer under *Mackay Radio* and the Court's permanent replacement decisions, Pet. 8-9.

We show below that the Eleventh Circuit's fact-bound and carefully reasoned decision creates no conflict among the circuits, is entirely consistent with this Court's permanent replacement decisions, and therefore presents no issue that warrants this Court's review.

STATEMENT OF THE CASE

Statement of the Facts

The factual background of this case is accurately set forth in the Eleventh Circuit's opinion below. App. 2a-4a. ALPA has served as the authorized collective bargaining representative for Eastern pilots for over 45 years. On March 4, 1989, the International Association of Machinists ("IAM")—the collective bargaining representative of Eastern's mechanics and ground service employees—commenced a lawful primary strike at Eastern. On the same day, ALPA and nearly all of the Eastern pilots decided to honor the IAM picket lines and to initiate a lawful sympathy strike in support of the IAM. *See Eastern Air Lines, Inc.* v. *Air Line Pilots Ass'n, Int'l*, 710 F.Supp. 1342 (S.D. Fla.), *aff'd*, 132 L.R.R.M. (BNA) 2392 (11th Cir. 1989).

After failing to obtain an injunction prohibiting Eastern pilots from engaging in a sympathy strike, Eastern, under the control and direction of Frank Lorenzo and the Texas Air Corporation, embarked on a scheme to oust ALPA and to "replace" its entire striking pilot work force with as many new hire pilots as Eastern could recruit. As part of that plan, Eastern extended employment offers to over 1200 pilot recruits to fill present and future staffing needs. Eastern's employment offers omitted any reference to existing RLA caselaw holding that trainees do not replace striking employees or attain permanent replacement status under the RLA until they complete training and actually perform employee services on a carrier's passenger flights in revenue service. App. 47a.[1]

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[1] Eastern submitted a series of self-serving declarations below in which certain trainees subject to the district court's decision in this case signed on to Eastern's *post hoc* contention that new hires would not have accepted Eastern's employment offers "unless they were treated as permanent replacements from the first day of training." Pet. 4 n.3. The record, however, does not remotely establish that Eastern could not have continued operations during the strike without such guarantees. *See infra* pp. 20-22.

Eastern periodically entered its pilot recruits in a new hire training program administered by Eastern under Federal Aviation Administration ("FAA") regulations. The training program included ground school instruction, flight simulator training, and initial operating experience ("IOE") flights under the direction of Eastern and/or FAA flight instructors. *See generally* 14 C.F.R. §§ 121.403-09 (1991) (describing ground school and simulator training); *id.* § 121.424 (describing IOE). Under FAA requirements, a prospective pilot cannot perform pilot services unless he or she successfully completes a series of FAA examinations, obtains an FAA pilot certificate that permits the new hire to operate Eastern aircraft in Eastern revenue operations, and secures a release from the FAA *after* successfully completing IOE training flights. *See* 14 C.F.R § 121.433. A pilot trainee recruited by Eastern during the strike thus could not occupy any Eastern pilot position or replace any striking pilot in Eastern revenue operations unless and until the recruit completed each of these FAA requirements. App. 3a.

Eastern's trainees required a minimum of eight weeks to complete ground school and simulator training under Eastern's training program and 10 to 25 additional hours of IOE training flights aboard Eastern aircraft before they could perform pilot services for Eastern. App. 2a-3a. Hundreds of Eastern's pilot recruits, however, remained in training for over four months before they secured an FAA release to perform Eastern revenue flying. Other pilot recruits waited for weeks or months after they accepted Eastern's employment offers before even beginning their new hire pilot training. The pilot trainees who successfully completed the entire training cycle commenced employee services for Eastern and replaced striking pilots by filling pilot positions in Eastern revenue operations. App. 9a.

In early August of 1989, hundreds of striking Eastern pilots made unconditional offers to return to work. App.

3a. At that time, Eastern maintained hundreds of pilot vacancies and required hundreds of additional pilots to meet immediate pilot staffing needs as it expanded operations following the IAM strike. App. 3a, 22a.[2] Despite its substantial and immediate need for qualified pilots, Eastern announced on August 11, 1989 that it would no longer reinstate former strikers to its unfilled pilot positions and that former strikers would be placed on a preferential recall list while Eastern indefinitely "reserved" its pilot vacancies for the trainees. By August of 1989, more than 800 of Eastern's pilot recruits had not completed the FAA-required training cycle, and many recruits had not even commenced pilot training. App. 3a, 22a.[3] These 800 trainees had not performed pilot services for Eastern, occupied any Eastern pilot position, or replaced any striking pilot in Eastern flight operations. Eastern required months to train this August trainee group, and many did not perform pilot services for Eastern until February or March of 1990.

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[2] From September of 1989 into 1990, for example, Eastern subcontracted substantial Eastern flight operations to its corporate affiliate Continental Airlines, Inc. ("Continental") because it lacked enough qualified pilots to operate its flight schedule. *See In re Ionosphere Clubs, Inc.*, 114 Bankr. 379, 385 (S.D.N.Y.), *aff'd in part, rev'd in part*, 922 F.2d 984 (2d Cir. 1990), *petition for cert. pending*, No. 90-1482. Eastern thereby utilized hundreds of Continental pilots to perform Eastern revenue flying during this period in order to reserve Eastern pilot vacancies for its new hire trainees, despite the availability of qualified former strikers. *See id.* In addition, both during and for months after the strike, Eastern unilaterally implemented scheduling and other work rule changes that permitted Eastern to staff its flight schedules with hundreds of fewer pilots than required under the ALPA-Eastern collective bargaining agreement. *See generally In re Ionosphere Clubs, Inc.*, 114 Bankr. at 385.

[3] Eastern suggests that its non-employee trainees somehow "filled" Eastern pilot positions while they remained in training because Eastern designated which aircraft equipment trainees would fly if and when they completed training. Pet. 10. In fact, as both the district court and the Eleventh Circuit found, Eastern maintained

On November 22, 1989, ALPA terminated the pilot strike, and all remaining strikers unconditionally offered to return to work. At the conclusion of the pilot strike, approximately 330 of Eastern's new hire pilot recruits remained in pilot training, and Eastern continued to require hundreds of additional qualified pilots to operate scheduled and planned Eastern revenue flights. App. 3a. Again, however, Eastern refused to fill post-strike pilot vacancies with returning strikers and "reserved" all available pilot positions for its new hire trainees (if and when they successfully completed training) before reinstating a single striking pilot from the preferential recall list. *Id.* In sum, as the court of appeals explained, "[f]rom at least early August, 1989, until August 2, 1990, when the district court granted ALPA's motion for a preliminary injunction, Eastern filled vacant pilot positions by giving preference to its new hire pilots, rather than Eastern's striking pilots who had unconditionally offered to return to service." App. 3a; *see also* App. 22a.

The district court and the Eleventh Circuit also found that Eastern could have filled pilot vacancies during and after the strike more quickly and cheaply by requalifying its licensed and experienced former strikers rather than reserving available pilot positions for months while new hire pilot recruits completed initial pilot training. App. 13a-14a, 27a-28a. In August of 1989, most former strikers could have been requalified to fill their pre-strike pilot positions in a few days. *See* 14 C.F.R. § 121.439. Even in November, Eastern could have requalified returning strikers for their pre-strike positions in approximately five days and for any position in "up to" 30 days. *See* 14 C.F.R. § 121.433(c). Eastern's pilot trainees, by

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hundreds of unfilled pilot vacancies when striking pilots sought reinstatement and Eastern's pilot trainees had not occupied or filled *any* Eastern pilot position or replaced *any* striking pilot when Eastern refused to reinstate strikers. App. 3a, 20a-22a.

contrast, often required several months of training before they could occupy Eastern's unfilled pilot positions and perform work to help Eastern continue operations during or after the strike. App. 13a-14a. As a result, Eastern's policy of reserving available pilot positions for trainees rather than reinstating licensed former strikers with years of Eastern pilot experience actually hampered Eastern's ability to operate both during and after the strike.

Course of Proceedings and Disposition Below

On cross-motions for partial summary judgment and ALPA's motion for a preliminary injunction, the district court held that the RLA prohibited Eastern from refusing to reinstate returning strikers to pilot vacancies by treating its non-employee pilot trainees as permanent replacements. App. 20a-29a. The district court explained that strikers remain statutory employees under the RLA both during and after a strike and are presumptively entitled to immediate reinstatement at the end of the strike. App. 22a-24a. The limited exception to this rule derived from *Mackay Radio*, the court explained, permits employers to delay reinstatement where strikers' "jobs have been *filled* by workers hired as permanent replacements during the strike in order for the employer to continue operations." App. 23a (emphasis added). In cases involving permanent replacement employees who actually *occupy* job positions during the strike, the Court has thus determined that "the employer's interest in continuing operations is 'deemed to outweigh the damage to concerted activities caused by permanently replacing strikers.'" App. 23a (quoting *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 232 (1963)).

As the district court explained, however, this Court has never suggested—under the RLA or otherwise—that employers can refuse to reinstate returning strikers by reserving hundreds of available post-strike vacancies for trainees who did not perform any work or fill the job positions of any striking employee during the strike.

App. 23a-24a. In the absence of such binding authority, the district court followed the Eighth Circuit's decision in *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *cert. denied in rel. part*, 485 U.S. 958 (1988), which held, under indistinguishable circumstances, that the RLA prohibits carriers from refusing to reinstate former strikers to post-strike job vacancies by treating airline trainees as permanent replacements. App. 26a-29a. The district court stayed its preliminary injunction pending appeal after Eastern agreed to recall 50 former strikers under the court's decision.

On appeal, the Eleventh Circuit agreed that the *Mackay Radio* doctrine encompasses new hires or crossovers who actually occupy the job positions claimed by returning strikers and that federal courts have been reluctant to expand *Mackay Radio* to further dilute the rights of returning strikers. App. 6a-7a. As the court of appeals explained, moreover, the Seventh and Eighth Circuits have looked to the RLA's unique statutory definition of covered employees[4] to hold that airline trainees neither enjoy the right to strike nor attain the status of permanent replacement employees until they complete training and perform actual employee services for the carrier. App. 9a-12a (discussing *Trans World*, 819 F.2d at 845-47 and *Air Line Pilots Ass'n, Int'l* v. *United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987)).

Given this interpretation of the RLA, the Eleventh Circuit held that Eastern cannot refuse to reinstate striking pilots by treating its trainees as permanent re-

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[4] The RLA limits protected employee status to persons "in the service of a carrier . . . who perform[] any work defined as that of an employee or subordinate official," 45 U.S.C. § 151, Fifth, and to "every air pilot . . . who performs any work as an employee . . . subject to [the carrier's] continuing authority to supervise and direct the manner of rendition of his service," *id.* § 181.

placement employees because the trainees "were not actually performing the work ordinarily discharged by the former strikers" when the strikers unconditionally returned to work. App. 13a.[5] Any contrary holding, the Eleventh Circuit reasoned, would strike a "fundamental blow to the union and the collective bargaining process," App. 18a, because it would allow an employer to replace its entire striking work force—without regard to actual business needs during or after the strike—by designating as permanent replacements a pool of trainees who could not and would not perform employee services until some date months in the future. App. 17a-18a.[6]

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CREATE ANY CONFLICT AMONG THE CIRCUITS

Eastern's principal argument for invoking this Court's review is that the decision below creates a conflict among the circuits concerning the status of trainees during airline strikes in light of the former Fifth Circuit's decisions in the *National* litigation. Pet. 9. In fact, the Eleventh Circuit's decision explicitly follows the uniform interpretation of the RLA by every circuit that has addressed the trainee issue presented in this case and carefully distinguishes the Fifth Circuit's decisions in the *National* litigation. App. 9a-17a.

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[5] In doing so, the Eleventh Circuit treated the former Fifth Circuit's decisions in *National Airlines, Inc.* v. *International Association of Machinists*, 416 F.2d 998 (5th Cir. 1969) (*"National I"*) and 430 F.2d 957 (5th Cir. 1970) (*"National II"*), *cert. denied*, 400 U.S. 992 (1971), as binding precedent and distinguished both decisions. App. 15a-17a.

[6] The Eleventh Circuit panel subsequently denied Eastern's Petition for Rehearing and no member of the panel or active Eleventh Circuit judge requested a poll on Eastern's Suggestion of Rehearing En Banc. App. 31a-32a. In January of 1991, Eastern ceased all airline operations, laid off its pilots, and began to liquidate its remaining assets.

1. First, as the court of appeals explained, the Eighth Circuit's decision in *Trans World* is the only other appellate decision to consider an RLA employer's attempt to treat non-employee trainees as permanent replacements. App. 10a-11a. In *Trans World*, the carrier hired and trained large numbers of would-be replacements for striking flight attendants, and over 450 of the new hires had not completed FAA-required training or commenced employee services at the conclusion of the strike. *See Trans World*, 819 F.2d at 841. As in this case, the carrier refused to reinstate former strikers to hundreds of post-strike job vacancies and reserved its job vacancies for flight attendant trainees who had not occupied any job position during the strike. *See id.* The carrier argued that the *Mackay Radio* exception permitted it to treat the flight attendant trainees as permanent replacement employees on their first day of training because the carrier believed that it could not attract a sufficient number of strike replacements without promising to do so. *See Independent Fed'n of Flight Attendants* v. *Trans World Airlines, Inc.*, 643 F.Supp. 470, 479 (W.D. Mo. 1986), *aff'd in rel. part*, 819 F.2d 839 (8th Cir. 1987), *cert. denied in rel. part*, 485 U.S. 958 (1988).

The Eighth Circuit held that the carrier's attempt to reserve post-strike vacancies for its trainees was inconsistent both with the RLA's statutory limitation on employee status and the rationale underlying this Court's permanent replacement decisions. As the Eighth Circuit explained:

> The trainees in question, although hired by TWA, never performed any services for TWA under its supervision prior to the Union's offer to return to work. Thus, they cannot be considered employees within the meaning of the RLA. . . . The RLA does not extend its coverage based upon the employer's labelling of persons as employees or the payment of salary. Rather, RLA coverage is determined by the *work the person performs* under the supervision of

> the employer. . . . Thus, clear statutory language supports the conclusion that the trainees are not employees protected by the RLA because these trainees were not "performing any work" of the carrier by any stretch of the imagination.

Trans World, 819 F.2d at 845-46; *see also id.* at 846-47 (explaining that the balance of employer and union interests struck in *Mackay Radio* does not permit an employer to reserve post-strike job positions for trainees who did not and could not perform employee services during the strike).[7]

The court of appeals held below that "[t]he facts of *Trans World* are indistinguishable from those in this case," App. 10a; *see also* App. 26a-27a,[8] and followed

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[7] The Eighth Circuit also held that the carrier could not treat crossover employees (who actually performed work and occupied employee positions during the strike) as permanent replacements under the RLA. *See Trans World*, 819 F.2d at 843-45. While this Court subsequently reversed the Eighth Circuit's crossover holding, the Court explicitly declined to grant certiorari to review the Eighth Circuit's trainee holding. *See Trans World*, 489 U.S. at 432; *see also* 485 U.S. 958 (1988).

[8] Eastern's attempt to distinguish the facts of *Trans World*, Pet. 13, 14 n. 13, creates no basis for reviewing the decision below. Eastern asserts that the Eastern training program conferred "employee" status on new pilot trainees because, on the first day of training, Eastern new hires are placed on the payroll, receive a "date[] of hire" utilized for calculating certain contractual benefits after they successfully complete training, and are assigned a number on the Eastern pilot seniority list. Pet. 4-5, 14 n.13. Even if Eastern correctly describes its treatment of new hire trainees (and we demonstrated before the courts below that it does not), Eastern's employment practices cannot transform new hire trainees into permanent replacement employees under the RLA. *See Trans World*, 819 F.2d at 846 (holding that such factors are "irrelevant under the RLA" because permanent replacement status under the RLA does not depend "upon the employer's labelling of persons as employees or the payment of salary"). The National Mediation Board has also uniformly held that carriers cannot confer employee status on airline trainees simply by providing them with a salary, seniority accrual

Trans World to hold that Eastern could not prefer its pilot trainees to former strikers in filling post-strike pilot vacancies. App. 13a. Accordingly, the only circuits to consider the trainee issue raised in the Petition have held the RLA does not permit carriers to treat trainees as permanent replacements unless and until the trainees actually occupy the job positions of striking employees.

2. Eastern concedes that the Eleventh Circuit "followed the Eighth Circuit's *Trans World* decision," Pet. 13, but contends that *Trans World* and the decision below are "wrong," *id.*, because the question of "whether new hires qualify as RLA 'employees' " is "irrelevant" to whether an RLA employer can treat trainees as permanent replacement employees. Pet. 13-14. But that is simply not the case. The RLA's unique statutory definition of covered employees governs the ability of *both* employers *and* unions to enlist the support of trainees during a strike. In *United*, for example, the carrier threatened to discharge a group of over 500 pilot trainees who joined a pilot strike after accepting the carrier's unconditional offers of employment but before completing pilot training. *See United*, 802 F.2d at 892. Notwithstanding the importance of the trainees to the union's strike effort, the Seventh Circuit rejected ALPA's claim that the trainees maintained the right to strike under the RLA once they accepted employment offers and commenced training. Instead, the Seventh Circuit held that the carrier could discharge all striking trainees because the trainees had not attained "employee" status under the RLA's unique statutory provisions. *United*, 802 F.2d at 911-14.

The decision below merely confirms that the RLA's statutory restrictions on employee status govern *both* a

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or any other employment benefit. *See, e.g., Rosenbalm Aviation*, 15 N.M.B. 313 (1988); *Midway Commuter*, 15 N.M.B. 278 (1988); *Simmons Airlines*, 15 N.M.B. 228 (1988).

union's ability to exert economic pressure by attempting to include trainees in its strike *and* a carrier's ability to exert economic pressure by attempting to "replace" striking employees with trainees who perform no employee services and occupy no job position during a strike. Any other outcome would permit RLA carriers to displace an entire striking workforce by promising permanent positions to trainees while prohibiting RLA unions from persuading such trainees to join the strike. Nothing in the RLA indicates that Congress intended to impose such a drastically unbalanced regime of self-help rights on unions and carriers.[9]

3. Finally, this interpretation of the RLA by the Seventh, Eighth and Eleventh Circuits does not conflict with the former Fifth Circuit's decisions in *National I* and *National II*. The *National* litigation concerned the rights of RLA employees who were discharged for engaging in an illegal wildcat strike, *see National I*, 416 F.2d at 1007, not the trainee issue presented in this case. In the decision below, the Eleventh Circuit treated *National I* and *National II* as binding precedent[10] and carefully distinguished both cases. App. 15a-17a. As a

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[9] As the court of appeals explained below:

> Acceptance of Eastern's analysis would result in the creation of two classes of common carrier employees; "permanent employees" entitled to the benefits and privileges of the RLA and bound by its duties and penalties, and a second class of "permanent employees" (the trainees) whose employer/employee relationship is not governed by the regulatory framework established by the RLA, and who are not extended the same benefits and obligations available to the other class of "permanent employees." No authority leads us to create such an anomalous situation.

App. 14a-15a.

[10] The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981. *See Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

result, Eastern's entire circuit conflict argument, Pet. 9-15, constitutes nothing more than a request that the Court grant certiorari to review an alleged "intracircuit" conflict and to overturn a circuit's interpretation of its own precedent.

As the court of appeals explained, moreover, the decision below is entirely consistent with *National II*. App. 15a-16a. Eastern asserts, as it did below, that the *National II* panel implicitly adopted an "offer and acceptance" standard for determining permanent replacement status under the RLA when it suggested in dicta that replacements must at least secure "fixed and irrevocable" arrangements with the employer. *National II*, 430 F.2d at 961. The *National II* opinion further explains, however, that former strikers are entitled to reinstatement unless their job positions have been *filled* by new hires who have actually "com[e] on the payroll" and "enter[ed] into service of the company" before strikers offer to return to work. *Id.* In any event, *National II* only involved prospective replacements who commenced employee services within a day or two after strikers sought reinstatement, and nothing in that decision permits carriers to refuse to reinstate former strikers to post-strike job vacancies for months while hundreds of unqualified new hires undergo training. App. 16a-17a, 25a-26a. Accordingly, Eastern's discussion of *National II* at most suggests that the former Fifth Circuit never addressed the trainee issue presented in this case and does not remotely demonstrate any conflict among the circuits.

Eastern's reliance on a district court decision in the *United* litigation, Pet. 12-13, is also misplaced. In *Air Line Pilots Association, International* v. *United Air Lines, Inc.*, 614 F. Supp. 1020 and 616 F. Supp. 849 (N.D. Ill. 1985), *aff'd in part, rev'd in part*, 802 F. 2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), the district court granted permanent replacement status to a group of 539 trainees hired during a pilot strike on the

theory that *all* trainees, including the group of 500 striking trainees, became statutory "employees" protected by the RLA as soon as they accepted the carrier's offers of employment. *See* 616 F. Supp. at 851; 614 F. Supp. at 1041-43. On appeal, however, the Seventh Circuit rejected the rationale underlying the district court's replacement decision when it held that new hire trainees are not protected "employees" under the RLA as a matter of law. *See United*, 802 F.2d at 910-13; *supra* pp. 12-13. The district court's decision in *United* thus provides no support for Eastern's circuit conflict argument.

II. THE ELEVENTH CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S PERMANENT REPLACEMENT DOCTRINE

In an attempt to create a basis for reviewing this settled interpretation of the RLA among the circuits, Eastern also claims that the decision below (1) is contrary to this Court's opinion in *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 489 U.S. 426 (1989), and the Court's other permanent replacement decisions, Pet. 15, 18-20, (2) conflicts with administrative decisions under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, Pet. 16-18, and (3) prevents RLA carriers from continuing operations during a strike, Pet. 21-23. Eastern is wrong on all three counts.

1. First, nothing in this Court's permanent replacement decisions indicates that employers can prefer non-employee trainees to returning strikers in filling post-strike job vacancies. To the contrary, the Court has long held that returning strikers are presumptively entitled to reinstatement to their pre-strike job positions unless the employer can demonstrate a legitimate and substantial business justification for refusing reinstatement. *See Trans World*, 489 U.S. at 433-34; *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). In general, an

employer's refusal to reinstate returning strikers to post-strike job vacancies thus unlawfully discriminates against protected employee conduct under federal labor law because it "discourage[s] employees from exercising their rights to organize and to strike." *Fleetwood Trailer*, 389 U.S. at 378; *see Erie Resistor*, 373 U.S. at 232.

In *Trans World*, this Court simply confirmed the narrow privilege recognized in *Mackay Radio* that permits employers to delay the reinstatement of former strikers where " 'the jobs claimed by the strikers are *occupied* [at the end of the strike] by workers hired as permanent replacements during the strike in order to continue operations.' " *Trans World*, 489 U.S. at 433-34 (emphasis added) (quoting *Fleetwood Trailer*, 389 U.S. at 379 (1967)). In *every* permanent replacement case considered by the Court, however, strike replacements actually *occupied* strikers' jobs both during the strike and at the time the strikers sought reinstatement.[11] In that limited context, the Court has determined that the employer's interest in continuing operations with permanent replacements who work during the strike outweighs the reinstatement rights of strikers, *see Trans World*, 489 U.S. at 433-34; *Erie Resistor*, 373 U.S. at 232, and that the RLA does not require the employer to discharge one

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[11] *See Trans World*, 489 U.S. at 428 ("We decide today whether, at the end of the strike, an employer is required by the Railway Labor Act to displace *employees who worked during the strike* in order to reinstate striking employees with greater seniority.") (emphasis added; citation omitted); *id.* at 438 (explaining that "[t]he positions *occupied* by newly hired replacements . . . are simply not 'available positions' to be filled" by returning strikers) (emphasis added); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 493-97, 500, 504 n.8 (1983) (explaining that the employer has no statutory obligation to discharge permanent replacement employees who filled job positions during the strike to make room for returning strikers); *Fleetwood Trailer*, 389 U.S. at 379 (same); *Mackay Radio*, 304 U.S. at 345-46 (permitting the employment of permanent replacements who worked during the strike where necessary to continue operations).

group of employees (new hire replacements who worked during the strike) to make room for another group of employees (returning strikers), *see Trans World*, 489 U.S. at 433-34.[12]

Neither *Trans World* nor any other decision of this Court, however, suggests that *Mackay Radio* either protects trainees who did not and could not occupy job positions during the strike or permits employers to prefer such trainees over returning strikers in filling job vacancies when strikers unconditionally offer to return to work. As the courts below explained in detail, such trainees do not fall within the purposefully limited *Mackay Radio* rationale because they cannot perform employee services to help the employer continue operations during a strike and, as in this case, may not be able to perform employee services for months after strikers offer to return to work. App. 17a-18a, 26a-29a. Indeed, Eastern could have more easily continued operations during and after the strike by reinstating licensed former strikers instead of "reserving" job vacancies for months while its pilot recruits remained in training. App. 13a-14a. Accordingly, the Eleventh Circuit's decision neither conflicts with *Trans World* nor impinges on an employer's privilege under *Mackay Radio* to refuse to reinstate former strikers whose jobs are actually occupied by strike replacements.

2. So, too, the NLRA administrative decisions discussed by Eastern, Pet. 15-18, do not control the self-help rights of strikers and employers under the RLA.

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[12] Eastern wrongly claims that this Court's *Trans World* decision establishes that RLA employers enjoy greater self-help rights than employers governed by the NLRA. Pet. 15. In fact, the *Trans World* court merely pointed out that the self-help schemes differ under the two statutes, *see Trans World*, 489 U.S. at 439, citing a decision in which the Court held that RLA *unions*—unlike their NLRA counterparts—are not prohibited from engaging in secondary picketing. *See Burlington Northern R.R.* v. *Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987).

"[T]he NLRA 'cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes.'" *Trans World*, 489 U.S. at 439 (quoting *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969)); *see also Chicago & N.W. Ry.* v. *United Transp. Union*, 402 U.S. 570, 579 n.11 (1971). The Court has thus long recognized that the range of self-help available to both unions and employers is not necessarily co-extensive under the two labor statutes. *See, e.g., Burlington Northern*, 481 U.S. at 446-48 (explaining that RLA unions retain the ability to engage in secondary picketing); *Jacksonville Terminal*, 394 U.S. at 393 (same).

As noted above, moreover, the circuits have uniformly held that the unique definition of "employee" status under the RLA governs the self-help rights of both RLA employers and employees and results in a different self-help regime than the self-help regime permitted under the NLRA.[13] *Compare United*, 802 F.2d at 911-12 (holding that the RLA's definition of employee status deprives airline trainees of the right to strike until they perform actual employee services) *with NLRB* v. *New England Tank Indus.*, 302 F.2d 273, 277-78 (1st Cir.) (holding that the NLRA provides individuals hired through offer and acceptance with the right to strike without first performing employee services), *cert. denied*, 371 U.S. 875 (1962). Eastern thus cannot create a basis for reviewing the interpretation of the RLA in the decision below by pointing to a handful of administrative decisions decided in the context of the NLRA's distinct stat-

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[13] Unlike the RLA, the NLRA expressly covers both applicants and all individuals "hired" by employers (through common law offer and acceptance) without regard to whether the new hire performs services for the employer. *See generally H. & F. Binch Co.* v. *NLRB*, 456 F.2d 357, 361-62 (2d Cir. 1972); *cf.* 29 U.S.C. § 152(3).

utory definition of employee status and its distinct regime of economic self-help.

In any event, the NLRA decisions cited by Eastern, Pet. 15-18, do not permit employers to refuse to reinstate former strikers to post-strike job vacancies for months while new hires complete training. At most, those agency or lower court decisions have accommodated the limited *Mackay Radio* exception to permit persons hired as replacements to commence employee services within a few days after the strike.[14] In *H. & F. Binch*, 456 F.2d at 357, for example, the Second Circuit, in an opinion by Judge Friendly, explained that an employer's offer to hire a would-be strike replacement does *not* relieve the employer of its statutory duty to reinstate former strikers unless the replacement's *actual* arrival on the job "will occur *at a reasonably early date.*" *Id.* at 362 (emphasis added). This standard does not "require a return-

[14] In each decision, the replacements performed "on the job" employee services either before the union's unconditional offer to return to work or were capable of beginning work within a few days thereafter. *See Solar Turbines, Inc.*, 302 N.L.R.B. No. 3, slip op. at 2-3 (March 11, 1991) (39 replacements scheduled for physical examinations and drug and alcohol testing within six or fewer days following the union's unconditional offer to return); *Home Insulation Serv.*, 255 N.L.R.B. 311, 311 (replacements capable of commencing work during the week the union called off its strike), *enf'd*, 665 F.2d 352 (5th Cir. 1981); *NLRB* v. *Cutting, Inc.*, 701 F.2d 659, 661-62 (7th Cir. 1983) (permanent replacements reported to work two days after strikers sought reinstatement); *Superior Nat'l Bank & Trust Co.*, 246 N.L.R.B. 721, 721 (1979) (two replacements reported within two days after strikers unconditionally offered to return to work). The alleged trainee cases cited by Eastern, Pet. 20, are also inapposite. The Sixth Circuit denied enforcement of *Kurz-Kasch, Inc.*, 286 N.L.R.B. 1343 (1987), and remanded the case for the precise determination of whether the employer maintained any post-strike vacancies when it refused to reinstate former strikers. *See Kurz-Kasch, Inc.* v. *NLRB*, 865 F.2d 757, 759-60 (6th Cir. 1989). *Anderson Clayton & Co.*, 120 N.L.R.B. 1208, 1214 (1958), involved trainees who performed actual revenue work for the employer while receiving on-the-job training.

ing striker to stand idly by and watch a job disappear" for months while new hires complete training. *Trans World*, 643 F. Supp. at 478 (applying the *H. & F. Binch* analysis to hold that replacements must commence employee services within two days after the strike to defeat the reinstatement rights of returning strikers).[15]

As a result, the Eleventh Circuit's refusal to permit Eastern to "reserve" post-strike vacancies for months after striking pilots sought reinstatement is fully consistent with even the most expansive interpretation of permanent replacement status under the NLRA.

3. Finally, the uniform interpretation of the RLA confirmed in the decision below does not prohibit carriers from either hiring permanent replacements under *Mackay Radio* or continuing operations during a strike. Pet. 18-24. No less than *Mackay Radio* and its progeny, the Eleventh Circuit's decision fully endorses the ability of employers to hire permanent replacements during a strike and to promise such replacements that they will not be discharged from job positions they occupy during the strike in order to make room for returning strikers. App. 9a. As Eastern itself acknowledges, Pet. 21 n.17, the *only* consequence of the decision below is to encourage RLA employers to begin hiring and training prospective replacements before the parties engage in self-help under the RLA and to complete the training of permanent replacements as soon as possible once a strike begins. *Cf. NLRB* v. *Brown*, 380 U.S. 278, 283-84 (1965) (dis-

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[15] Contrary to Eastern's repeated assertions, Pet. 19-23, the NLRA does not allow employers to offer replacements whatever special privileges the employer deems necessary to hire employees during a strike. *See, e.g., Erie Resistor*, 373 U.S. at 222 (holding that superseniority benefits for strike replacements are unlawful under the NLRA even though the "employer asserts that these additional benefits are necessary to continue his operations during a strike"); *NLRB* v. *Harrison Ready Mix Concrete, Inc.*, 770 F.2d 78 (6th Cir. 1985).

cussing the ability of employers to engage in strike preparations). Such trained new hires will actually occupy the job positions of striking employees, help the employer continue operations, and attain permanent replacement status from the beginning of a strike. *See United*, 802 F.2d at 892.[16]

The arsenal of economic weapons available to RLA employers during a strike also includes the ability to offer permanent replacement status to crossovers who occupy employee positions during the strike, *see Trans World*, 489 U.S. at 443, to alter collectively-bargained work rules in order to operate with fewer personnel, *see Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246-47 (1966), to subcontract operations to other carriers, *see In re Ionosphere Clubs, Inc.*, 114 Bankr. at 385;[17] *cf. American River Touring Ass'n*, 246 N.L.R.B. 935 (1979), and to offer substantial monetary inducements to prospective strike replacements, *see United*, 802 F.2d at 909. These self-help options amply permit RLA employers to continue operations during a

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[16] Eastern's suggestion that the decision below permits a union to "oust" permanent replacements by "dribbl[ing] strikers back to work," Pet. 22, is simply wrong. Prospective strike replacements who complete IOE training flights and enter revenue service will occupy pilot positions and attain permanent replacement status to the extent the employer maintains *any* unfilled pilot positions and *any* pilots remain on strike. Suppose, for example, that a struck employer maintains 1000 pilot vacancies because 1000 of its pilots remain on strike. When a new hire pilot recruit completes pilot training, he or she will occupy a pilot vacancy and attain permanent status unless the strike has been called off or all 1000 pilots have sought reinstatement to the carrier's pilot vacancies.

[17] The ALPA-Eastern collective bargaining agreement restricted Eastern's ability to subcontract operations during the pilot sympathy strike. *See In re Ionosphere Clubs*, 114 Bankr. at 385. Like all RLA carriers, however, Eastern could seek judicial approval to depart from the terms of its collective bargaining agreement in order to subcontract flight operations during the strike under the standards established in *Florida East Coast*, 384 U.S. at 246-48.

strike without refusing to reinstate returning strikers to post-strike job vacancies that were not occupied by replacements during the strike.

In sharp contrast, Eastern's attempt to expand *Mackay Radio* to cover a pool of hundreds of pilot trainees would reduce the right to strike under the RLA to a nullity. Under Eastern's "offer and acceptance" theory, an employer could replace its entire striking work force on the first day of a strike by conferring permanent replacement status on a sufficiently large pool of prospective employees—even if the strike ended in two days. An employer could thereby replace its entire work force despite the fact that its "replacements" could not be qualified to perform *any* services for the employer (and thus could not help the employer continue operations) unless and until they completed training *months* after strikers sought reinstatement. Eastern's "offer and acceptance" rule thus would permit employers to nullify any strike in a matter of days without regard to actual operational needs *during* the strike and would transform every strike into an opportunity for the employer to oust the union and its supporters. *See generally Florida East Coast*, 384 U.S. at 246-47 (refusing to interpret the RLA to provide employers with a "strong reason to prolong the strike and even break the union").

Every court to consider the issue presented in the Petition has correctly recognized that the balance of interests struck in *Mackay Radio* does not permit an RLA employer to treat trainees as permanent replacements because they do not perform any employee services or replace any striker until months after strikers return to work. "To conclude otherwise would allow an employer to amass a trainee pool capable of replacing the entire striking work force at some future date after the strike has ended" without regard to the employer's actual operational needs during a strike. *Trans World*, 819 F.2d at 846.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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